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In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM L. CALLEY, JR., PETITIONER

v.

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 519 F. 2d 184. The opinion of the district court (Pet. App. B) is reported at 382 F. Supp. 650. The opinion of the United States Court of Military Appeals (Pet. App. C) is reported at 22 U.S.C.M.A. 534, 48 C.M.R. 19. The opinion of the United States Army Court of Military Review (Pet. App. D) is reported at 46 C.M.R. 1131.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1975. The petition for a writ of cer-

tiorari was filed on November 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether pretrial publicity denied petitioner a fair trial.

2. Whether the refusal of a congressional subcommittee to release testimony taken in executive session deprived petitioner of due process.

3. Whether the refusal to issue certain subpoenas requested by the defense deprived petitioner of his Sixth Amendment rights to confrontation and compulsory process.

4. Whether the Charges, Specifications and Bill of Particulars adequately apprised petitioner of the charges against him and protected him from being twice placed in jeopardy.

STATEMENT

1. In April 1969, the Department of the Army received reports of a massacre of Vietnamese civilians by United States forces on March 16, 1968, at My Lai (4) hamlet, Song My village, Quang Ngai province, Republic of South Vietnam. After a thorough investigation, petitioner, who was then a first lieutenant in the United States Army, was charged with the premeditated murder of not less than 100 of the Vietnamese civilians killed at My Lai, in violation of Article 118 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. 918. This Initial Charge, as refined by a Bill of Particulars, alleged in two separate

specifications that petitioner was responsible for the murder of not less than 30 Oriental human beings at a trail in the southern portion of the village (Specification 1) and not less than 70 Oriental human beings in a ditch on the eastern edge of the village (Specification 2). Subsequent investigation led to the preferral of an Additional Charge, also containing two specifications, alleging that petitioner had murdered two Vietnamese civilians—an old man (Specification 1) and a child about two years old (Specification 2), in violation of Article 118. On November 24, 1969, the charges were referred to trial by general court-martial at Fort Benning, Georgia (Pet. App. A, p. 7692).

2. The evidence at trial—which began on November 12, 1970, and ended with petitioner's conviction on March 29, 1971—is set forth in detail in the opinion of the Army Court of Military Review (Pet. App. D, pp. 1163–1173). The evidence showed, in essence, that petitioner was a platoon leader in "C" Company, which was ordered on March 15, 1968, to seize the hamlet of My Lai and destroy all that could be useful to the enemy. The unit was informed by Task Force Headquarters that it could expect resistance from the enemy. The attack began on the morning of March 16. Encountering only unresisting civilians and no Viet Cong soldiers, petitioner's platoon—which was to lead the sweep through My Lai—quickly became disorganized. During a period lasting between two to four hours on the morning of March 16, petitioner super-

vised and participated in the systematic killing of a large number of villagers (Pet. App. D, pp. 1163–1164).

The specifications against petitioner separated the killings into four chronologically distinct episodes. The evidence under Specification 1 of the Initial Charge showed that petitioner shot, and ordered to be shot, numerous old men, women and children along a trail in the southern part of the village. Photographic evidence depicted about 20 bodies strewn along the trail. Presumably because of the testimony of a pathologist that only one wound on one body was certain to have been instantly fatal, the court found petitioner guilty of murdering not less than one person on the trail (*id.* at 1169–1170).

The evidence under Specification 2 of the Initial Charge related to the next episode, the killings at an irrigation ditch in the eastern part of the hamlet. Petitioner personally expended between 10 and 15 magazines of ammunition at the ditch and was convicted of killing not less than 20 people there (*id.* at 1170–1172).

After the incident at the ditch, petitioner and a subordinate encountered a man between 40 and 50 years of age who was dressed in the white robes of a monk. Petitioner shot the man in the head and was convicted of the premeditated murder of one male human being, as alleged in Specification 1 of the Additional Charge. Immediately thereafter, petitioner flung a Vietnamese child, about two years old, into the ditch. Petitioner fired at the child, but the witness

who described this incident did not see whether the child had been struck. Accordingly, although Specification 2 of the Additional Charge alleged the premeditated murder of a two-year-old child, the court found petitioner guilty of a lesser included offense, assault with intent to commit murder in violation of Article 134, UCMJ, 10 U.S.C. 934 (Pet. App. D, pp. 1172–1173).[1]

3. Petitioner was sentenced to confinement at hard labor for life, dismissal from the service, and forfeiture of all pay and allowances. On August 20, 1971, the reviewing authority, after a review by the staff judge advocate, approved the findings and sentence except as to the period of confinement, which was reduced to 20 years. See Article 64, UCMJ, 10 U.S.C. 864. The Army Court of Military Review affirmed the conviction and sentence after having thoroughly analyzed and rejected 31 separate assignments of error

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[1] Petitioner admitted having participated in most of the murders of which he was convicted. The major emphasis of his defense was that he lacked the requisite *mens rea* because he was acting under orders from Captain Medina, the Commander of "C" Company, to kill everyone in the village, even women and children. Captain Medina denied at trial having given this order. His testimony was corroborated by a number of witnesses, including most of the members of petitioner's platoon who testified.

The military judge properly instructed the members of the court that an order to kill unresisting Vietnamese would have been illegal. The members of the court could therefore have convicted petitioner on either of two bases: a finding that petitioner was not given such an order or, alternatively, that petitioner realized (or should have realized) the illegality of such an order. Since a court-martial conviction is in the nature of a general verdict, it cannot be ascertained which finding actually led to petitioner's conviction (see Pet. App. D. pp. 1173–1184; Pet. App. C, pp. 26–27).

(Pet. App. D; see Article 66,UCMJ, 10 U.S.C. 866). The United States Court of Military Appeals subsequently granted a petition for review with respect to three issues,[2] and on December 21, 1973, it affirmed the conviction and sentence (Pet. App. C; see Article 67, UCMJ, 10 U.S.C. 867). The Court of Military Appeals denied a petition for reconsideration on February 4, 1974.

Prior to execution of petitioner's sentence, the Secretary of the Army undertook the review required by Article 71(b) of the UCMJ, 10 U.S.C. 871(b). On April 15, 1974, the Secretary approved the findings and sentence, but in a separate clemency action he commuted the confinement portion of the sentence to 10 years. The President reviewed the case in his capacity as Commander-in-Chief of the Armed Forces and on May 3, 1974, notified the Secretary of the Army that he would take no further action in the matter. The next day, the Army executed that portion of petitioner's sentence calling for his dismissal from the service.

4. On February 11, 1974, prior to review by the Secretary of the Army, petitioner sought habeas corpus relief in the United States District Court for the

[2] The Court of Military Appeals determined that only three of petitioner's 31 allegations of error merited discussion: (1) that pretrial publicity had deprived petitioner of due process; (2) that the evidence was not sufficient to support the verdict; and (3) that the military judge gave erroneous instructions concerning the requirement of malice aforethought and the defense of compliance to orders by superiors.

Middle District of Georgia.[3] On September 25, 1974, the district court held (Pet. App. B) that petitioner was entitled to a writ of habeas corpus on four grounds: (1) prejudicial pretrial publicity had precluded a fair trial; (2) the refusal of the military judge to subpoena certain witnesses had deprived petitioner of certain of his constitutional rights; (3) the refusal of the House of Representatives to release to the defense certain testimony taken in executive session had deprived petitioner of due process; and (4) the charges failed to give petitioner fair notice of what he had to defend against and left him vulnerable to being twice placed in jeopardy for the same offenses. Accordingly, the district court ordered petitioner immediately released on bail pending appeal. The Army appealed and petitioner cross-appealed.

At the Army's request, the court of appeals granted a temporary stay of the district court's order of immediate release. The Fifth Circuit later reinstated the order granting petitioner's immediate release pending appellate review and, acting *sua sponte,* ordered an *en banc* hearing. On September 10, 1975, the court of

[3] The court immediately issued an *ex parte* order restraining respondents, the Secretary of the Army and the Commanding General at Fort Benning, from changing petitioner's place of custody or the conditions of his confinement. On February 27, 1974, the district court ordered petitioner released on bail pending disposition of his habeas petition. The court of appeals reversed the district court's orders and returned petitioner to the custody of the Army. *Calley* v. *Callaway*, 496 F. 2d 701 (C.A. 5), rehearing denied, 497 F. 2d 1384.

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appeals (by a vote of 8 to 5, with 2 judges recusing themselves), reversed the judgment of the district court and reinstated the judgment of the court-martial (Pet. App. A). The dissenting members of the court pretermitted the issue of pretrial publicity and rejected all other grounds for reversal of the conviction except for the one relating to the refusal of a congressional subcommittee to turn over testimony taken in executive session.[4]

ARGUMENT

Resolution of the issues raised by petitioner in this Court depends in large measure upon an evaluation of the evidence in the record. Since the military courts, after careful examination of the record, rejected petitioner's claims, there is no need for civilian review. As this Court stated in *Burns* v. *Wilson*, 346 U.S. 137, 144:

> [I]t is not the duty of the civil courts * * * to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in * * * applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims.

[4] Petitioner is presently under sentence but has been released on bail pursuant to court order. Thus, petitioner is sufficiently restrained to be "in custody" for purposes of habeas jurisdiction. *Jones* v. *Cunningham*, 371 U.S. 236; see also *Carafas* v. *LaVallee*, 391 U.S. 234. The Secretary of the Army has approved a parole for petitioner, to be effective immediately upon his return to military control (assuming that he is returned to military control following final disposition of this case).

See also *Schlesinger* v. *Councilman*, 420 U.S. 738, 746–748; *Parker* v. *Levy*, 417 U.S. 733, 762. Accordingly, in responding to the issues raised by petitioner, we rely substantially on the opinions of the military courts (Pet. Apps. C and D). We also rely on the Fifth Circuit's opinion (Pet. App. A), which thoroughly analyzes and correctly rejects each of petitioner's claims.

1. Relying on numerous decisions of this Court (*e.g.*, *Marshall* v. *United States*, 360 U.S. 310; *Irvin* v. *Dowd*, 366 U.S. 717; *Rideau* v. *Louisiana*, 373 U.S. 723; *Estes* v. *Texas*, 381 U.S. 532; *Sheppard* v. *Maxwell*, 384 U.S. 333), petitioner contends at some length (Pet. 6–35) that he was deprived of due process because of prejudicial pretrial publicity. He argues that the publicity surrounding his case was so virulent and pervasive that prejudice must be presumed despite assertions of impartiality by the six members of his court-martial during *voir dire*. He concomitantly suggests (Pet. 30, 34–35) that prejudicial publicity would prevent him from ever receiving a fair trial. These contentions are adequately answered in several of the opinions below (Pet App. A, pp. 7707–7718; Pet. App. C, pp. 21–23; Pet. App. D, pp. 1142–1148, 1157–1163). We add only a few comments.

This Court has made clear that a jury's exposure to pretrial publicity is not necessarily a bar to a fair trial.[5] As this Court stated recently in *Murphy* v. *Florida*, 421 U.S. 794, 800–801 n. 4:

[5] The force of petitioner's argument that exposure to publicity concerning the killings at My Lai inevitably prejudiced the jurors is diminished by the defense's "concerted effort * * * to have placed on the panel officers who had knowledge of many aspects of this case" (Pet. App. A, pp. 7714–7715).

> We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. * * * To ignore these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.

See also *Irvin* v. *Dowd, supra,* 366 U.S. at 722–723.

The totality of the circumstances in the present case fully supports the findings below that the pretrial publicity concerning the incidents at My Lai was not so prejudicial or inflammatory as to render the members of the court incapable of reaching a fair verdict in petitioner's case. Petitioner was not tried in an atmosphere of persecution. Much of the pretrial publicity consisted of "straight news stories rather than invidious articles which would tend to arouse ill will or vindictiveness." *Beck* v. *Washington,* 369 U.S. 541, 556. Indeed, there were indications that the climate at Fort Benning, the site of the court-martial, was "somewhat favorable" to petitioner (Pet. App. D, p. 1146).

Even though the judge who presided at petitioner's court-martial allowed defense counsel full opportunity to discover "any manifest or even latent prejudice during *voir dire*" (Pet. App. D, p. 1148), no indication was developed that any of the six persons ultimately selected to serve had a preconceived notion of petitioner's guilt or innocence. As the Court of

Military Review observed (Pet. App. D, p. 1148), moreover, there were no special circumstances here requiring the military judge to disbelieve the court members' assurances of impartiality. Thus, this case is significantly unlike the situation in *Irvin* v. *Dowd, supra,* where this Court looked beyond the jurors' claims of impartiality because 8 of the 12 jurors had expressed a belief in the defendant's guilt at some point during *voir dire.*[6]

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[6] Petitioner contends (Pet. 33) that the record reveals that at least one of the jurors, Major McIntosh, was biased against him because he stated during *voir dire* that he had seen one of the potential witnesses for the prosecution on television and that the person had "seemed credible" on that occasion. But Major McIntosh also stated during *voir dire* that he had not formed a general impression of the credibility of the person in question and that if the person testified at the court-martial he would determine his credibility solely on the basis of the testimony given at the court-martial (Pet. App. A, p. 7716, n. 47). As the court of appeals noted (*id.* at 7717), moreover, the defense did not challenge Major McIntosh for cause and that fact is "'strong evidence that [petitioner] was convinced the juror [was] not biased and had not formed any opinion as to his guilt'" [quoting from *Beck* v. *Washington,* 369 U.S. 541, 558].

Although petitioner asserts (Pet. 31, n. 16) that his failure specifically to challenge each of the jurors, including Major McIntosh, for cause is insignificant in view of his "continuous" challenge to every prospective juror, that assertion is unpersuasive. Petitioner's continuous challenge proceeded from his contention that jury prejudice must be presumed because of prejudicial pretrial publicity rather than from evidence of actual and particular prejudice on the part of individual jurors. Since petitioner did specifically challenge several prospective jurors for cause, moreover, the military judge can hardly be faulted for having failed to exclude Major McIntosh on the basis of an observation which the defense apparently did not find sufficient to request that he do so.

It is also significant that the procedures followed by the military judge in this case—not only during *voir dire*, but at all other times—"assured insofar as could be done the right to a fair trial by an impartial court-martial" (Pet. App. D, p. 1145). See *Sheppard* v. *Maxwell, supra.* The ameliorative actions of the military judge are discussed in the opinions below (*e.g.*, Pet. App. D, pp. 1143–1145). Particularly noteworthy is the long period of time that elapsed between the peak of the publicity (November and December of 1969, and January of 1970) and the beginning of the trial almost a year later (November 1970). Indeed, the military judge stated that he had intentionally delayed the start of the trial "to let the effect of any pretrial publicity dissipate" (Pet. App. A, pp. 7712–7713, n. 41). Additionally, during the four months of trial the military judge "employed all possible means to insure the insulation of the court members from tainting influences" (Pet. App. D, p. 1144). It is undisputed that the court members were not exposed to any prejudicial publicity during this period.[7]

[7] Petitioner improperly relies on those cases which hold that the failure of a trial judge to take ameliorative action helps to establish a violation of due process. In those cases (*e.g.*, *Estes* v. *Texas*, *supra*; *Turner* v. *Louisiana*, 379 U.S. 466; *Sheppard* v *Maxwell*, *supra*) the trial court "participated in or actually exacerbated the tainting influences" (Pet. App. D, p. 1145). Petitioner can show no such dereliction of duty here.

Petitioner points (Pet. 22–23) to the fact that there was no military judge to take protective measures during the "critical period" from September 5, 1969, to November 25, 1969. The primary reason for this delay was that the charges against petitioner were not referred to trial until the completion of the "Article 32" investigation on November 24, 1969. It would have been improper to appoint a military judge prior to that time.

Petitioner also emphasizes (Pet. 24–25) that the military judge did not give precautionary instructions to five of the six jurors until after they had been exposed to a year of publicity concerning the case. But petitioner does not dispute the fact that the military judge gave proper instructions to all six of the persons who ultimately served as soon as they had been added to the list of prospective jurors.

Similarly, petitioner suggests (Pet. 25) that his conviction must be reversed because the military judge had no contempt power outside the courtroom to deter violations of his protective orders. It is true that one or more of the civilian witnesses disregarded the judge's order not to discuss publicly their recollections of the events in issue. But this is not a situation in which the judge "exacerbated" prejudicial influences and, in any event, the crucial question is whether any of these circumstances influenced the persons who served on the court-martial against petitioner. As the military courts and the court of appeals noted, a close examination of the *voir dire* dispels any concern with regard to the exposure of the six members of the court to the statements of witnesses who violated the judge's protective orders.

There is no merit to petitioner's claim (Pet. 25–27) that his conviction must be reversed because the military judge denied a defense request to restrain the media from publicizing statements of potential witnesses about My Lai or showing pictures of the bodies of people killed there (see Pet. App. D, pp. 1144–1145; Pet. App. A, pp. 7717–7718). There is a heavy presumption against the constitutionality of prior restraints on the media. See, *e.g.*, *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1307 (opinion of Mr. Justice Powell in chambers); *Nebraska Press Association* v. *Stuart*, No. 75–817, certiorari granted December 12, 1975 (opinion of Mr. Jus-

tice Blackmun in chambers); *United States* v. *Dickinson*, 465 F. 2d 496, 506 (C.A. 5), certiorari denied, 414 U.S. 979. In view of the severity of such an order, the military judge cannot be faulted for refusing to grant the defense request. As discussed above, moreover, the record here—especially the thorough and sensitive *voir dire*—disproves petitioner's assertions that the persons who served on the court-martial were prejudiced against him.[8]

In response to petitioner's assertion (Pet. 20) that the members of the court were influenced by certain public statements of high-ranking officials (such as the President of the United States, the Secretary of Defense and the Secretary of the Army), we rely on the opinion of the Court of Military Review (Pet. App. D, pp. 1157–1163), which concluded that the statements in question—which were not "directed to potential court members"—had no prejudicial effect (Pet. App. D, p. 1162):

> [T]heir utterance almost a year prior to trial, their overall neutral character, and the vague

[8] The issues before the Court in *Nebraska Press Association* v. *Stuart*, *supra*, No. 75–817 (certiorari granted, December 12, 1975), are not presented here. *Stuart* involves a challenge, on First Amendment grounds, to a court order restraining media coverage during a criminal trial. The issue in the present case, however, is not whether the order requested by the defense would have been constitutional, but whether the failure of the military judge—on the particular facts of this case—to issue such an order was an abuse of discretion preventing a fair trial. That factual issue, not presented in *Stuart*, has been resolved adversely to petitioner by the military courts and by the court of appeals. There is thus no reason to defer disposition of the petition in this case pending a decision in *Stuart*.

> recollection or absence of any recollection of these statements by the court members demonstrate no fair risk of the exertion of improper command influence.

In short, there is no reason to doubt the compliance of members of the court-martial with their sworn assurances of impartiality. Petitioner cannot demonstrate actual prejudice; nor can he persuasively analogize this case to cases in which prejudice has been presumed. Compare, *e.g.*, *Rideau* v. *Louisiana*, *supra* (20-minute film of defendant's confession telecast three times in a community where crime and trial took place); *Estes* v. *Texas*, *supra* (press allowed to overrun bar of the court with television equipment); *Sheppard* v. *Maxwell*, *supra* (overwhelming media demand for defendant's conviction coupled with negligent failure of trial judge to take precautionary measures to avoid contamination of trial itself); *Marshall* v. *United States*, *supra* (seven jurors learned from the newspaper during trial of defendant's prior convictions of similar offenses).

2. In response to the widespread public interest in the events at My Lai, the Chairman of the House Armed Services Committee created a special subcommittee to investigate the matter. In order to avoid prejudicing the rights of any defendant in possible criminal trials arising from the incident, however, the subcommittee announced at the outset that testimony would be taken in executive session and would not be released.

At his court-martial, petitioner requested the production of this testimony under the Jencks Act, 18 U.S.C. 3500, and *Brady* v. *Maryland*, 373 U.S. 83. Although the military judge initially declined to rule whether either the Jencks Act or *Brady* required the production of the testimony, he did suggest that the testimony might be helpful and, on three separate occasions, he issued subpoenas to the House of Representatives. The House never released the testimony (Tr. 461, 492–493, 3348).[9] Neither the defense nor the prosecution was given access to the material, nor was the material ever released to the military judge for *in camera* inspection.

Petitioner eventually moved under the Jencks Act to prevent individuals who had testified before the House subcommittee from testifying at trial. The military judge denied the motion, ruling that the Jencks Act "does not include within its framework statements or testimony given to congressional subcommittees in executive session" and that, "in light of the extraordinary volume of similar matter provided to the defense in this case," the House's refusal to disclose the testimony would not deprive petitioner of due process (Tr. 527).

Petitioner now argues (Pet. 36–59) that the House subcommittee improperly invoked its general privilege of confidentiality in refusing to furnish to the defense testimony that may have been valuable for purposes of exculpation or impeachment. He also argues (Pet. 37) that his inability to obtain the requested materials was a deprivation of constitutional proportions. These claims were thoroughly examined below and were properly rejected (see Pet. App. D, pp. 1184–1195; Pet. App. A, pp. 7725–7733).

[9] "Tr." refers to the transcript of the court-martial.

a. It is not necessary for this Court to consider the propriety of Congress' refusal to turn over the testimony in question. As the court of appeals correctly observed," [t]he issue before us is not the legality of this [congressional] action, but rather the effect of denying the testimony to the defense" (Pet. App. A, p. 7727 n. 60).[10] Since the military courts have decided this factual issue adversely to petitioner, civilian review is not warranted.

The record in this case amply supports the conclusion of the military courts that the refusal of the congressional subcommittee to release the materials in question did not significantly affect petitioner's trial. As the Court of Military Review concluded (Pet. App. D, p. 1195), folowing an exhaustive examination of the record (Pet. App. D, pp. 1163–1173):

> The House Investigating Subcommittee conducted only one of a number of investigations into My Lai. The defense was provided with volumes of pretrial statements given by the Government witnesses during the many investi-

[10] Petitioner asks this Court to extend its holding in *United States* v. *Nixon*, 418 U.S. 683, involving a claim of presidential privilege with respect to materials subpoenaed for use in a grand jury investigation, to the instant case. But the decision in *Nixon*, which involves materials already in the possession of the Executive Branch, provides no guidance so far as the only issue presented here is concerned—that is, the effect of nondisclosure on petitioner's trial.

> gations conducted within the Army; and those witnesses who testified both before the investigating subcommittee and at trial did not present the heart of the government's case.[11]

The court of appeals similarly concluded (Pet. App. A, pp. 7729–7730) that petitioner had failed "to offer even a reasonable possibility that something helpful to the defense was adduced before the [House] Subcommittee that was not already developed in the thousands of pages of testimony, statements and documents already afforded the defense."

Thus, even if a case might be imagined in which congressional insistence upon maintaining the confidentiality of materials developed in executive session and in the course of legitimate legislative activities would create a situation so fundamentally unfair as to foreclose prosecution of a criminal charge, this is clearly not such a case. The massive amount of materials made available to the defense and the absence of any indication that the withheld materials would have affected the outcome of the trial provided a firm basis for the court's conclusion that the materials at issue

[11] Petitioner contends (Pet. 44–45) that two of these witnesses, Medina and Thompson, did present the heart of the government's case. The Court of Military Review accurately concluded (Pet. App. D, p. 1195), however, that "[t]he key Government witnesses were Sledge, Meadlo, Conti, Dursi and Turner." Petitioner was provided with other pretrial statements of every prosecution witness (including Medina and Thompson) who testified before the subcommittee (Pet. App. A, p. 7729).

would have been merely cumulative of other materials possessed by the defense.[12]

b. Petitioner's reliance (Pet. 43–50) on *Brady* v. *Maryland, supra,* is misplaced. In *Moore* v. *Illinois,* 408 U.S. 786, 794–795, this Court enunciated the test to be used in evaluating claims under *Brady* (emphasis added):

> The heart of the holding in *Brady* is the *prosecution's* suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

But the prosecution in the present case was not guilty of having suppressed evidence: indeed, the subcommittee's refusal to release the transcripts meant that they were equally unavailable to the prosecution and the defense. Petitioner provides no persuasive

[12] Petitioner argues (Pet. 42) that this conclusion involves a kind of "Catch 22" because he cannot prove the value of the congressional transcripts without seeing them. Certainly, petitioner cannot be required to make a precise showing of what the transcripts would reflect. But the prosecution labors under the same disability with respect to demonstrating that nothing of important exculpatory value exists in the congressional transcripts. In the circumstances of this case, it is surely reasonable to place the burden of coming forward in this particular matter on the defense, and the absence of even a minimal showing that the transcripts would have been helpful to the defense is fatal to petitioner's constitutional claim. See *Milton* v. *Wainwright*, 407 U.S. 371, 377–378; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 265–266 (Powell, J., concurring).

support for his contention that *Brady* was intended to apply to "congressional" suppression as well as "prosecutorial" suppression. In fact, the decisions of this Court indicate the contrary. See *Wardius* v. *Oregon*, 412 U.S. 470, 473–474; *United States* v. *Augenblick*, 393 U.S. 348; *Brady* v. *Maryland*, *supra*, 373 U.S. at 87. Although Article 46 of the UCMJ, 10 U.S.C. 846, guarantees defendants equal access with the prosecution to discoverable materials, that mandate—which, in our view, is the most that due process requires—was strictly enforced here.

c. Neither is there any merit to petitioner's assertion (Pet. 51–59) that the denial of his Jencks Act motion was an error of constitutional magnitude. The military courts correctly concluded (*e.g.*, Pet. App. D, pp. 1190–1194) that the disclosure requirements of that Act were not intended to apply to the files and records of Congress itself.[13] In any event, this Court noted in *United States* v. *Augenblick*, *supra*, that infractions of the Jencks Act do not normally rise to the level of a constitutional violation.[14] As discussed

[13] The court of appeals did not reach this issue (Pet. App. D, p. 7732 n. 65). Contrary to petitioner's suggestions (Pet. 52, n. 3), the ruling of another military judge that the Jencks Act does apply to testimony before a congressional committee is hardly an indication that the military judge here acted "arbitrarily." Indeed, the only other court to address that issue specifically held that the Jencks Act is not applicable to such materials. *United States* v. *Ehrlichman*, 389 F. Supp. 95, 97 (D.D.C.).

[14] It reached that conclusion in *Augenblick*, even though the denial of discovery in that case may have "seriously impeded [the defendant's] right to a fair trial" (393 U.S. at 356). It clearly follows from that conclusion that there was no constitutional violation here (see Pet. 52–53).

above, petitioner has not made a reasonable showing that the nonavailability of the documents in question prejudiced his defense (see Pet. App. A, p. 7733; Pet. App. D, pp. 1194–1195).

3. Petitioner further contends (Pet. 60–66) that his Sixth Amendment rights to confrontation and compulsory process were violated by the refusal of the military judge to issue subpoenas to the Secretary of Defense, the Secretary of the Army, and the Army's Chief of Staff requiring them to appear and testify at a pretrial hearing. This issue was fully and fairly considered by the military courts (*e.g.*, Pet. App. D, pp. 1151–1157, 1189), which concluded that there was no factual basis for petitioner's allegations (see also Pet. App. A, pp. 7718–7724).

a. Petitioner sought subpoenas for these three witnesses in an attempt to show that "command influence" had permeated the processing of the charges against him. See Article 37, UCMJ, 10 U.S.C. 837. Initially, the sole support for petitioner's claim was a newspaper article. Nevertheless, the military judge required the prosecution to bear the burden of coming forward with evidence to rebut the allegation of command influence.

At a hearing on this issue, the government adduced testimony from each officer at Fort Benning who was involved in the processing of the charges against petitioner. All of these officers testified "that they did not receive, directly or indirectly, any instructions as to an appropriate disposition of the case" (Pet. App. D,

p. 1154). In light of this evidence, the military judge ruled that the defense had failed to establish a need for issuance of the subpoenas, but that he would issue the subpoenas if defense counsel could demonstrate such a need. The defense never made a colorable showing that the charges against petitioner were the product of command influence.[15]

The Sixth Amendment does not confer an absolute right to compulsory process. The issuance of subpoenas in the military is governed by paragraph 115a of the *Manual for Courts-Martial, United States* (Rev. ed. 1969), which makes materiality and relevance important factors in the discretionary decision to issue a subpoena. Rule 17(b) of the Federal Rules of Criminal Procedure similarly vests broad discretion in federal district courts to grant subpoenas on behalf of indigent defendants, at government expense, where it is claimed that "the presence of the witness is necessary to an adequate defense." The safeguards

[15] The opinion of the Court of Military Review (Pet. App. D, p. 1155) and the majority and dissenting opinions in the court of appeals (Pet. App. A, pp. 7724, 7736) all noted the "lack of defense efforts to litigate [this] issue" (Pet. App. D, p. 1155). At the trial, defense counsel volunteered to interview the witnesses and promised that he would return to the court with an offer of proof if it appeared that the witnesses had important testimony to present. Indeed, defense counsel twice asked for and received a specific order from the military judge authorizing interviews with all three witnesses. The defense failed, however, to offer to the military judge any further evidence on this subject. Petitioner's suggestion (Pet. 61–62) that the military judge's initial ruling was irrevocable has no support in the record (see Pet. App. A, p. 7724 n. 58; Tr. 272–274; 304; 424–425).

contained in these provisions are all that the Sixth Amendment requires. See Pet. App. A, p. 7723.[16]

The military judge's refusal to issue the requested subpoenas was not an abuse of discretion. In holding to the contrary, the district court did not give sufficient deference to the findings of the military courts. The court of appeals properly observed in this regard (Pet. App. A, p. 7723):

> The military judge conducted an extensive hearing on [petitioner's] contentions. He found there was no evidence to support the accusations of command influence. The defense was then forced to take the position that, although no one at Fort Benning was pressured into bringing charges as a result of command influence, General Westmoreland, the Secretary of Defense and the Secretary of the Army might nonetheless state, if called as witnesses, that they had in fact wielded such pressure. We hold that the conclusions of the military judge, which were fully and fairly considered and reaffirmed by the Court of Military Review, amply support the decision not to subpoena the witnesses in question.

[16] As Mr. Justice (then Circuit Judge) Blackmun stated in *Slawek* v. *United States*, 413 F. 2d 937, 960 (C.A. 8):

"[A] rich defendant may have the right to waste his money on unnecessary and foolish trial steps, but that does not, in the name of necessary constitutional equality, give the indigent the right to squander government funds merely for the asking. Slawek overlooks the fact that compulsory process under Rule 17(b) is a matter within the area of the trial court's discretion."

In military prosecutions, the government bears all witness costs. See *Manual for Courts Martial, United States*, paragraph 115d (Rev. ed. 1969).

b. Petitioner similarly claims (Pet. 66–67) that the military judge's refusal to issue a subpoena for a potential defense witness, John Tunstal, violated his Sixth Amendment rights. According to petitioner, Tunstal would have impeached a prosecution witness, Dennis Conti, by testifying that petitioner had reprimanded Conti for sexually assaulting a Vietnamese woman prior to the incident at My Lai. This testimony was claimed to support petitioner's allegation that Conti nurtured hostility toward him which he vented in his trial testimony. The court of appeals unanimously rejected this claim (Pet. App. A, pp. 7724–7725, 7737).[17] As the court observed, petitioner failed to make any showing that Tunstal's anticipated testimony would not have been merely cumulative of other testimony to the same effect (Pet. App. A, p. 7725):

> [U]nder questioning from the military judge, defense counsel acknowledged that this alleged incident [the sexual assault by Conti] occurred prior to My Lai, that Tunstal's previous statements had never indicated his knowledge of any such incident, that Tunstal had not even indicated whether Calley was present at or aware of the assault, and that Tunstal did not even indicate that the incident was reported. Thus, the import of Tunstal's testimony was only that he was aware of an assault by Conti on a Vietnamese woman prior to My Lai. That

[17] On direct appeal, the military courts rejected petitioner's argument as not meriting discussion.

> Conti had engaged in sexual misconduct was well established at trial.[18]

4. Petitioner's final contention (Pet. 68–74) is that the Charges, Specifications and Bill of Particulars did not give him adequate notice of the charges against him or protect him from subsequently again being placed in jeopardy for the same offenses. In support of his claim of inadequate notice, petitioner argues that he was convicted of killing several groups of Vietnamese at the ditch, that he was not present when certain killings at the ditch took place, and that preparing a defense against all of the separate offenses with which he had been charged was impossible because of the confused nature of the testimony. In support of his double jeopardy claim, he argues that he could have been (or may later be) convicted of killing the same people twice. As an example, he notes that the old man and the small child, whose murders were alleged in the Additional Charge, may have been among the bodies in the ditch referred to in Specification 2 of the Initial Charge. These claims are answered in the opinion of the court of appeals (Pet. App. A, pp. 7733–7734).[19]

With respect to both the notice and double jeopardy issues raised by petitioner, "[t]he Constitution

[18] The military judge stated that he would reconsider the subpoena request if the defense could show that Tunstal's testimony would somehow connect petitioner with the incident involving Conti and the Vietnamese woman. But "[d]espite this opportunity, no such connection was ever subsequently demonstrated" (Pet. App. A, p. 7725).

[19] The court of appeals unanimously rejected these contentions (Pet. App. A, p. 7737).

requires that criminal charges be sufficiently specific (1) to apprise the defendant of what he must be prepared to meet at trial, and (2) to enable the defendant to show with accuracy the extent to which he may plead former acquittal or conviction in other proceedings brought against him for a similar offense" (Pet. App. A, p. 7734). The charges here met these requirements. As set forth in the Specifications and refined by the Bill of Particulars, the charges included the chronological sequence and the geographical setting of the separate events—the killings at the trial (in the southern portion of the hamlet), the killings at the ditch (in the eastern portion), and, finally, the murders of the monk and the child. The military judge's instructions at the close of evidence, which were "detailed and thorough" (Pet. App. A, p. 7734), required the members of the court to pay close attention to these chronological and geographic distinctions. Moreover, the verdict, which modified three of the four Specifications, reflected substantial fact-finding discrimination. As to the "fair notice" claim, the court of appeals noted (Pet. App. A, p. 7734):

> [Petitioner] did not deny his involvement and participation in the mass killings at the ditch and the trial. It is difficult to understand how a defendant is deprived of fair notice of the charges against him when he confirms that the alleged incidents happened and that he participated in them.

Petitioner's argument that the charges and testimony were so confused that he may have been convicted of killing the same people twice (or of murders

he did not commit) are, in large part, an attack on the sufficiency of the evidence. That issue was resolved against petitioner by the Court of Military Review following an exhaustive study of the record (Pet. App. D, pp. 1163–1173; see also *id.* at 1173–1184).[20] Further review of that issue is not warranted.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[20] Even if there is merit to petitioner's claim that his conviction under Specification 2 of the Initial Charge (the murder of "not less than 20 persons") may have included the killing of the old man and the child, the proper remedy would simply be to alter the verdict under that Specification to encompass the murder of "not less than 18 persons." Petitioner—who has been released on bail and has been granted parole in the event his conviction is affirmed—is hardly in a position to suggest that such a modification in the verdict would affect his punishment.

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